LE COPY

No. 528

NOV 19 1958
JAMES R. BROWNING, Clerk

In The Supreme Court of The United States

October Term, 1958

NORRIS EDWARD BASS
doing business as
N. E. BASS,
Gladys, Virginia,
Appellant

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
ATLANTIC GREYHOUND CORPORATION
CAROLINA COACH COMPANY, Inc.
EASTERN GREYHOUND LINES
RICHMOND GREYHOUND LINES, Inc.
VIRGINIA STAGE LINES, Inc.
Appellees

On Appeal From The United States District Court for
The Western District of Virginia
Lynchburg Division

JURISDICTIONAL STATEMENT

WILBERT G. BURNETTE,
Counsel for Appellant
302 7th Street
P. O. Box 859
Lynchburg, Virginia

TABLE OF CONTENTS

Index 1
Opinion Below 4
Statement 4
Jurisdiction 5
The Questions 6
Statement of the Case 8
The Questions Are Substantial 11
Certificate of Service 14
Appendix A 17
Appendix B 22
Appendix C 27

TABLE OF CASES

Atchison T. & S. F. R. Co. v. *U. S.*, 284, *U. S.*, 284..... 12
Schaffer Transportation v. *U. S.*, 355, *U. S.*, 83..... 10, 14
Smith v. *Hoboken R. R., et. al.*, 328, *U. S.*, 123..... 12
Texas & P. R. Co. v. *I. C. C.*, 162, *U. S.*, 197..... 12

STATUTES CITED

28 U.S.C. 1253 5
28 U.S.C. 2325 5
49 U.S.C. 302 11
49 U.S.C. 303 (14) 4, 6, 9, 10, 11, 13, 14
49 U.S.C. 303 (15) 4, 6, 7, 9, 10, 11, 12, 14
49 U.S.C. 303 (21) (b) (a) 11
49 U.S.C. 304 (1) 4
49 U.S.C. 304 (2) 4
49 U.S.C. 306 .....4, 6, 10, 13
49 U.S.C. 307 .....4, 6, 9, 10, 13
49 U.S.C. 308 13
49 U.S.C. 309 .....4, 6, 7, 8, 9, 10, 11, 12, 13
U. S. Constitution, Art. 1, Sec. 8 4
National Transportation Policy 27

In The Supreme Court of The United States

October Term, 1958

No. .....

NORRIS EDWARD BASS, doing business as
N. E. Bass
Gladys, Virginia,

Appellant

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
ATLANTIC GREYHOUND CORPORATION
CAROLINA COACH COMPANY, Inc.
EASTERN GREYHOUND LINES
RICHMOND GREYHOUND LINES, Inc.
VIRGINIA STAGE LINES, Inc.

Appellees

On Appeal From the United States District Court For The
Western District of Virginia
Lynchburg Division

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the Three-Judge District Court in this case is reported at 163 Fed. Supp. 1 and the case is entitled *Norris Edward Bass* v. *United States of America and The Interstate Commerce Commission, et al.* A copy of the opinion is attached as Appendix A. The case was *Docket No. MC-116215, Norris Edward Bass Contract Carrier Application* before the Interstate Commerce Commission and a copy of the report of the Commission is attached as Appendix B.

STATEMENT

Congress, under authority of Article 1, Section 8, of the Constitution of the United States of America has provided that the public shall have two classes of passenger service by motor vehicle; one class is a common carrier by motor vehicle, which class of carrier is to operate under a certificate, 49 U.S.C. 306 and 307, and is to transport passengers and property for the general public for compensation, 49 U.S.C. 303 (14), but is not to operate as a contract carrier, 49 U.S.C. 303 (15).

The other class is a contract carrier by motor vehicle, which class of carrier is to operate under a permit, 49 U.S.C. 309(b), and can only transport passengers or property in interstate or foreign commerce under individual contracts or agreements for compensation, 49 U.S.C. 303(15). Congress made a distinction between a common carrier and a contract carrier as to the kind of service each is to render and as to the character of proof necessary for each to adduce to obtain authority to engage in operation. Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), specifically directs that the Interstate Commerce Commission shall issue a permit to any qualified applicant if it appears that the applicant is fit willing and able to properly conduct the proposed service and that the proposed service will be consistent with the public interest and the National Transportation Policy.

Congress provided that it shall be the duty of the Interstate Commerce Commission to regulate common carriers by motor vehicle, 49 U.S.C. 304(1), and to regulate contract carriers by motor vehicle, 49 U.S.C. 304(2), and to do so by fair and impartial regulation of all modes of transporta-

tion, so administered as to recognize and preserve the inherent advantage of each (see National Transportation Policy).

Norris Edward Bass filed with the Interstate Commerce Commission, under the provisions of the Interstate Commerce Act and in accordance with the rules and regulations of the Commission, an application seeking a permit from the Commission authorizing him to conduct operation as a contract carrier by motor vehicle transporting passengers under individual contracts or agreements in Interstate Commerce.

The Interstate Commerce Commission denied the application of Bass and Bass brought civil action before the District Court of three Judges under the provisions of 28 U.S.C. 2325 to set aside the order of the Commission and to remand the case to the Commission. The District Court denied the petition for injunction.

The opinion of the District Court of three Judges is dated June 30, 1958 and the opinion and order were entered of record on July 11, 1958. Notice of appeal was filed on September 5, 1958 in the District Court of the United States for the Western District of Virginia, Lynchburg Division. The notice was served upon all parties of record as evidenced by the certificate of service of plaintiff affixed to the notice. The District Court, on October 31, 1958 enlarged the time to docket the case in the Supreme Court to November 20, 1958 and notice thereof was served upon all parties.

JURISDICTION

A direct appeal from a District Court of three Judges to the Supreme Court of the United States is allowed plaintiff by 28 U.S.C. 1253. This section follows:

> "That any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a District Court of three judges."

This proceeding was required to be heard by a District Court of three Judges, 28 U.S.C. 2325.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act are set forth in Appendix C.

THE QUESTIONS

The questions presented by this appeal for the Supreme Court to determine and supply the answers are:

1. Can a common carrier operating under a certificate render passenger service as a contract carrier as defined in 49 U.S.C. 303(15) in view of the plain prohibition in 49 U.S.C. 303(15) against common carriers defined in 49 U.S.C. 303(14) rendering contract carrier service?

2. Since a contract carrier is any person other than a common carrier who engages in interstate operation under individual contracts or agreements, 49 U.S.C. 303(14, 15), and since a common carrier is any person who engages in operation for the general public for compensation, can the District Court join together contract carriers and common carriers and treat them as one and the same when Congress divorced them and described the field of operation of each?

3. Can the District Court substitute its judgment for the plain language of the Act providing for passenger service by a contract carrier under a permit (49 U.S.C. 309[b]) and passenger service by a common carrier under a certificate (49 U.S.C. 306 and 307)?

4. Did Congress provide, as the Court held, "that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service is adequate and whether the additional proposed service will be inconsistent with the public interest and the National Transportation Policy"?

5. Did not Congress provide for passenger service both by contract carriers by motor vehicle and by common carriers by motor vehicle notwithstanding the adequacy or inadequacy of the service of each other?

6. Did Congress, in adopting the National Transportation Policy include within that Policy passenger service by a contract carrier under Sections 203(15) and 209(b) of the Interstate Commerce Act (49 U.S.C. 303[15] and 309[b])?

7. Did not Congress mean, in laying down its National Policy, that the Commission is compelled to allow duplicate passenger service by one who offers passenger service as a contract carrier under individual contracts or agreements, notwithstanding the existence of "special or chartered parties" service by common carriers?

8. Can the Commission deny an application for authority to conduct passenger service as a contract carrier because it concluded that passenger service proposed to be conducted by a contract carrier is not essentially different from the service offered and afforded by common carriers?

9 Can the Court and the Commission read into the Act to regulate commerce a provision that contract carrier service must be denied because it resembles the service of a common carrier when the Act to regulate commerce clearly distinguishes between the two classes of carriers?

10. Can the Interstate Commerce Commission in considering an application for a permit disregard the inherent advantages of passenger service rendered by a contract carrier over the passenger service rendered by a common carrier?

11. Can the Interstate Commerce Commission disregard the plain language of 49 U.S.C. 309(b) and deny the application of Bass when it is provided that the Commission shall grant a permit to any qualified applicant for authority to conduct passenger service as a contract carrier under individual contracts or agreements?

12. Can the Interstate Commerce Commission, under the Act, deny Norris Edward Bass a permit authorizing him to conduct passenger service as a contract carrier by motor vehicle of passengers for compensation under individual contracts or agreements when contract carrier service by motor vehicle is not available and the report of the Commission shows from the record that there is a need for passenger service by a contract carrier?

13. Is operating a school bus within a single state under a contract with a state government transporting school children to and from school such operation as to make the operator thereof engaged in transportation as a regular occupation or business so as to preclude him from making casual, occasional or reciprocal trips transporting passengers by motor vehicle in interstate commerce without a permit?

14. Is passenger service rendered by a common carrier and by a contract carrier one and the same service in accordance with the Act to regulate commerce?

15. Can the District Court merge passenger service by common carriers and contract carriers when Congress completely divorced these two classes of service or carriers?

STATEMENT OF THE CASE

The Interstate Commerce Commission denied the application of Norris Edward Bass for a permit authorizing him to conduct passenger service as a contract carrier by motor

vehicle for compensation as authorized by 49 U.S.C. 309. In considering the evidence of record, the report of the Commission shows that:

> "Other carriers (common carriers) have been utilized for these trips, but due to extra charges for side trips and the inflexibility of the operation once contracts have been arranged, their (common carriers) service has not been as satisfactory as that of applicant" (Bass) and "The minister (a colored preacher) has utilized applicant's (Bass') service for approximately six years, has found it to be satisfactory * *. His satisfaction stems from applicant's (Bass') congeniality and willingness to accommodate individual desires and needs of his passengers."

The proposed passenger service of applicant is purely a service of a contract carrier by motor vehicle (49 U.S.C. 303[15]) as distinguished from passenger service of a common carrier by motor vehicle (49 U.S.C. 303[14]). Nevertheless, the Commission, after finding that the service of common carriers by motor vehicle has not been as satisfactory as that of Bass, concluded that:

> "The proposed service is not essentially different from that offered and afforded by the opposing motor common carriers. We are unable, therefore, to agree with applicant's contentions (1) that the proposed service is that of a contract carrier, and (2) that since only common carrier service is now available, a grant of the application would be consistent with the public interest and the National Transportation Policy."

The Interstate Commerce Act, 49 U.S.C. 307, definitely provides for passenger service by a common carrier by motor vehicle and after providing for a passenger service by common carriers, Congress then specifically provided for passenger service by a contract carrier, 49 U.S.C. 309. Therefore, it is clear that the Commission has failed to recognize the inherent advantages of passenger service by a contract carrier

over the passenger service of a common carrier by motor vehicle and the specific provisions of the Interstate Commerce Act. We quote from *Schaffer Transportation* v. *U. S.*, 355 *U. S.* 83, as follows:

> "The Supreme Court, Mr. Chief Justice Warren, held that determination by the Interstate Commerce Commission in denying the application on ground that railroad's service presently available was reasonably adequate and that witnesses' main purposes in supporting the application was to obtain lower rates rather than improved service, was improper for failure to evaluate inherent advantages of motor service proposed."

A look at the report of the Commission will show the application of Bass was denied because, contrary to the Act, the Commission held that:

> "The supporting witnesses have presented no evidence to indicate that the group transportation desired by them cannot be performed by those common carriers under the Commission's rules and regulations as set forth in the Chartered Party Service Case Supra."

The Commission compared the proposed passenger service of a contract carrier with the chartered party service of a common carrier, and in so doing, the Commission ignored the advantages of contract carrier service over common carrier service (*see Schaffer Transportation Case Supra*) and the plain provisions of 49 U.S.C. 303(14, 15), 306, 307 and 309. Moreover, the Commission required Bass to tender proof in support of his application different from that required in 49 U.S.C. 309. Bass, under 49 U.S.C. 309, is required, before a permit will issue, to show that he is fit, willing and able to perform the proposed service and that the proposed service will be consistent with the public interest and the National Transportation Policy. This proof Bass tendered and since there is no passenger service by motor vehicle available or authorized by the Commission to be

rendered by a contract carrier under a permit, the proposed service is not only in the public interest but is specifically required to be granted by 49 U.S.C. 309(b).

The next proposition is: does Bass' operation wholly within Virginia under contract with the Commonwealth of Virginia, transporting school children to and from school make him engaged in transportation as an occupation or business? This operation is specifically exempt from regulation by the Interstate Commerce Commission, as the Interstate Commerce Act, 49 U.S.C. 302(b), provides that nothing in this part (Part II, Interstate Commerce Act) except the provisions of Section 204 relative to qualification and maximum hours of service * shall be construed to include motor vehicles employed solely in transporting school children and teachers to and from school in interstate commerce. Then, 49 U.S.C. 302(b) provides that nothing in this part (Part II, Interstate Commerce Act) shall be construed to authorize a motor carrier to do an intrastate business on the highways of any state or to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce.

The Commission held that Bass' operation from Virginia to points in several states did not come within the exemption provisions of 49 U.S.C. 303 (21) (b) (a) allowing him to make casual, occasional and reciprocal trips out of Virginia transporting passengers for compensation. The District Court erroneously sustained the Commission.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are unique in that the Commission has never granted, to our knowledge, a permit to a contract carrier authorizing passenger service to be performed by a contract carrier, notwithstanding the fact that the Interstate Commerce Act has been in effect for over 20 years and that the Act, 49 U.S.C. 309, specifically authorizes the issuance of permits to contract carriers authorizing them to transport passengers. Congress, in 49 U.S.C. 303(14) and (15) specifically distinguished these two classes of carriers but the Commission and the District Court have

failed to recognize and apply that distinction but consider passenger service rendered by contract carriers and common carriers to be the same service. A determination of this problem is warranted in the administration of the Act which Act provides for passenger service by a contract carrier and the Interstate Commerce Commission has failed to provide passenger service by a contract carrier. But, the Interstate Commerce Commission recognizes that there is a difference between the service and operation of a contract carrier of property and the service and operation of a common carrier of property. The Commission goes one step further and gives actual effect to the difference between these carriers by granting applications for permits to conduct operation as contract carriers of property and certificates to conduct operation as common carriers of property. If the Act authorizes contract carriers of property, it also authorizes contract carriers of passengers as the authority for both operations, passenger and property by contract carriers, is found in the same Act and the same Section, 49 U.S.C. 309 and 49 U.S.C. 303(15). Consequently, if service by contract carriers of property can be authorized and is granted by the Commission notwithstanding the similarity of that service with the service of a common carrier of property, then the decision of the Court and the Commission is arbitrary and capricious. These issues can only be determined by this Honorable Court. The appeal should be actually heard. The importance of the problem in the administration of the Interstate Commerce Act is sufficient for this Honorable Court to decide the issues (see *Smith* v. *Hoboken R. R. et al*, 328 *U. S.* 123).

Then, too, the Interstate Commerce Commission operates in a field limited by constitutional rights and legislative requirements (see *Atchison, T. & S. F. R. Co.* v. *U. S.*, 284 *U. S.* 284) and its rules and orders must be confined to the obvious purposes and directions of the Interstate Commerce Act (see *Texas & P. R. Co.* v. *I.C.C.*, 162 *U. S.* 197). In this proceeding, the Commission has not confined its action to the purpose and direction of the Act regulating carriers as it has disregarded 49 U.S.C. 309 and the National Transportation Policy. Congress directed two classes of passenger service by motor carriers, one a passenger service by common carrier

(49 U.S.C. 303[14], 49 U.S.C. 306, and 49 U.S.C. 307), and the other a passenger service by contract carrier (49 U.S.C. 303[15] and 49 U.S.C. 309). The Commission and the Court have not followed the Act because both have put common carrier passenger service and contract carrier passenger service upon the same footing when, in fact, Congress made a distinction between the two classes of passenger service for the Interstate Commerce Commission and the Court to observe and the public to enjoy.

The District Court is in error in holding that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service is adequate and whether the additional proposed service will be inconsistent with the public interest and the National Transportation Policy. The Court put passenger service by a contract carrier and passenger service by a common carrier upon the same footing when Congress specifically said that they are different kinds of service. Congress specifically provided for passenger service by a contract carrier under a permit (49 U.S.C. 309) and did so notwithstanding the fact it had previously provided for passenger service by a common carrier under a certificate of public convenience and necessity, 49 U.S.C. 306 and 49 U.S.C. 307. Congress did not provide that a common carrier could render passenger service as a contract carrier but did provide under 49 U.S.C. 308, as a term or condition of a certificate, that a common carrier by motor vehicle transporting passengers under a certificate issued under this part (Part II, Interstate Commerce Act) may transport in interstate or foreign commerce to any place "special or chartered parties" under such rules and regulations as the Commission may prescribe. The contract carrier service by a common carrier considered by the District Court and the Commission is not a service Congress said a common carrier under a certificate could perform, as Congress specifically limited the service of a common carrier to *special* or *chartered parties*, as distinguished from passenger service rendered under an individual *contract* or *agreement* by a contract carrier. It makes no difference what the service of a common carrier may be, still the public is entitled

to the inherent advantages of contract carrier service over the passenger service of a common carrier, *Schaffer Transportation* v. *U. S. Supra,* and the National Transportation Policy. In 49 U.S.C. 303(15), Congress made a clear distinction between the service of a contract carrier and that of a common carrier and the Commission and the Court cannot merge two different services which Congress has divorced and made independent of each other. A contract carrier is any person who performs service under an individual contract or agreement other than transportation performed by a common carrier described in 49 U.S.C. 303(14). Please see 49 U.S.C. 303(15) which specifically distinguishes the service of a contract carrier from the service of a common carrier. This distinction the District Court failed to recognize and the Commission ignored. For these reasons, among others, the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

The appeal should be heard and the issues determined by this Honorable Court.

NORRIS EDWARD BASS

By: W. G. BURNETTE.
Counsel for Appellant

302 7th Street
P. O. Box 859
Lynchburg, Virginia
November 18, 1958.

CERTIFICATE OF SERVICE

I, W. G. Burnette, counsel for Norris Edward Bass, doing business as N. E. Bass, Gladys, Virginia, plaintiff-appellant herein, and a member of the Bar of the Supreme Court of the United States, having been admitted to practice on the 13th day of February 1947, hereby certify that on the 18th day of November, 1958, I served copies of the foregoing Juris-

dictional Statement of plaintiff-appellant on the severa parties of record in the District Court as follows:

1. On the United States, by mailing a copy in a duly ad dressed envelope, with postage prepaid, to:

Honorable John Strickler
United States Attorney
Western District of Virginia
Roanoke, Virginia.

To: The Solicitor General
Department of Justice
Washington 25, D. C.

To: Honorable Victor R. Hansen
Assistant Attorney General
Department of Justice
Washington 25, D. C.

To: James E. Kilday, Esq., Attorney
Department of Justice
Washington 25, D. C. and

To: E. Riggs McConnell, Esq., Attorney
Department of Justice
Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to:

Honorable Robert W. Ginnane
Chief Counsel
Interstate Commerce Commission
Washington 25, D. C., and

To: Carroll T. Prince, Jr., Esq., Attorney
Interstate Commerce Commission
Washington 25, D. C.

3. On Atlantic Greyhound Corporation, Carolina Coach Company, Eastern Greyhound Lines, Richmond Greyhound Lines, Inc., and Virginia Stage Lines, Inc., intervening defendants, by mailing copies in duly addressed envelopes with first class postage prepaid, to their respective attorneys of record as follows:

L. C. Major, Jr., Esq.
Turney & Turney
2001 Massachusetts Avenue, N. W.
Washington 6, D. C., and

To: William C. Battle, Esq.
Perkins, Battle & Minor
Court Square Building
Charlottesville, Virginia.

Attorneys for intervening defendants.

W. G. BURNETTE, *Counsel for Norris Edward Bass*
302 7th Street (P. O. Box 859)
Lynchburg, Virginia

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

Lynchburg Division,

June 30, 1958.

NORRIS EDWARD BASS, d/b/a N. E. BASS, Gladys, Virginia,
Plaintiff,

v.

UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Defendants

ATLANTIC GREYHOUND CORPORATION, CAROLINA COACH COMPANY, INC., EASTERN GREYHOUND LINES, RICHMOND GREYHOUND LINES, INC., and VIRGINIA STAGE LINES, INC.,
Intervening Defendants.

CIVIL ACTION No. 415

Before: SOBELOFF, Circuit Judge, and THOMPSON and BARKSDALE, District Judges.

Wilbert G. Burnette, for petitioner; E. Riggs McConnell (Victor R. Hansen and John Strickler on the brief) for the United States; Carroll T. Prince, Jr., (Robert W. Ginnane on the brief) for the Interstate Commerce Commission; and William C. Battle and Linwood C. Major, Jr. (Perkins, Battle & Minor and Turney & Turney on the brief), for the intervening defendants.

PER CURIAM:

This three-judge court was constituted, as required by Title 28 USCA, Sec. 2284, to hear and determine the plaintiff's petition, filed pursuant to Title 28 USCA, Sections 1336, and 2321-2325, seeking to set aside and annul an order of the Interstate Commerce Commission. The Commission had denied his application for a permit to operate in interstate commerce as a contract carrier by motor vehicle in charter service between points in Virginia and all points in the United States.

The business of the plaintiff is that of transporting children to and from schools in Campbell County, Virginia. He has also been transporting special groups, usually, but not exclusively, school children and boy scouts, under charter contracts on educational tours, camping trips and church-convention trips. He holds no permit from the Interstate Commerce Commission, although some of these trips are across state lines. His application asked the Commission to determine whether or not these interstate operations were legally permissible without a permit, and if the Commission should hold that a permit was required, he asked that one be granted to him.

I.

In this proceeding, the plaintiff makes no contention that the fact findings of the Commission are not supported by substantial evidence. He contends, however, that by Title 49 USCA, Section 309 (b), being "fit, willing and able properly to perform the service of a contract carrier by motor vehicle," he is entitled to a permit, notwithstanding the fact that a number of common carriers serving the same area are providing, in addition to their common carrier service, chartered contract service. The theory of the plaintiff is that the National Transportation Policy, 54 Stat. 899; 49 USCA preceding Section 1 (See 1957 pocket part) requires the Commission so to administer the Act as to recognize and preserve "the inherent advantages" of all modes of transportation, subject to the provisions of the Act; that common carriers are engaged in one mode of transportation, and contract carriers

in another, and that considering the "inherent advantages" of both, it is not an answer to his application to say that contract services are being provided by the licensed common carriers, for, says the plaintiff, the public must not be "denied the service of a contract carrier, and forced to accept the substituted [charter] service of a common carrier."

The Commission and the five intervening common carriers who oppose the application contend that the common carriers operating in the area do in fact provide adequate charter service of the type which the applicant proffers; that the service the applicant proposes to offer the public is not essentially different from the charter service which the common carriers are already providing; and that there is no basis in law for any distinction between the charter services presently available and those the plaintiff seeks authority to provide. The defendants say that when the statute speaks of "recognizing and preserving the inherent advantages" of the respective modes of transportation, it refers to something other than the mere incidental question of whether the charter service is being provided by licensed common carrier or by one who engages in contract carriage exclusively.

The case of *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, relied upon by the plaintiff, does not support his argument. What the court there decided was that the existing rail service for shipments of granite did not excuse the Commission from comparing and considering the "inherent advantages" of shipments by motor service. We need not go so far as to adopt the defendants' view that the "modes of transportation" refer only to transportation by water, highway and rail, and to no other bases of comparison. "Modes of transportation" may possibly pertain to other differences. However, we do not agree that the National Transportation Policy adopted by Congress legislated, as the plaintiff contends, that, even though a particular type of charter service is made adequately available by common carriers, the Commission must nevertheless authorize duplicate service, whenever the same is tendered, by contract carriers who are not common carriers. In other words, we do not believe that Congress, in laying down its national policy,

meant that, notwithstanding the existence of adequate contract charter service by common carriers, the Commission is still compelled to allow duplicate facilities by one who offers contract service exclusively.

We hold that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service is adequate and whether the additional proposed service will be inconsistent with the public interests and the national transportation policy.

II.

The further contention made by the plaintiff is based upon Title 49 USCA, Section 303 (b) (1). This section, it is true, exempts from regulation by the Interstate Commerce Commission (except as to certain safety measures) motor vehicles employed solely in transporting children and teachers to and from school. We agree that, if the plaintiff limited himself to the transportation of children and teachers to and from school within the State of Virginia, the Interstate Commerce Commission could not regulate him, but we do not agree that he comes within the exempting provision of Section 303 (b) (9) for the reason that he is not, in the language of that provision, a "person not engaged in transportation by motor vehicle as a regular occupation or business."

The purpose of Section 303 (b) (9) is to exempt casual or occasional transportation of passengers or property by motor vehicle in interstate commerce by a person not engaged in transportation by motor vehicle as a regular occupation or business. It is clear beyond question, however, that the plaintiff is regularly engaged in that occupation or business.

While administrative interpretation cannot change a clear provision of the law, it may, in a doubtful case, assist in its interpretation. We do not think that the point is doubtful, but even if it were, it would be set at rest by the consistent administrative rulings of the Commission during the past twenty years that a person engaged in transporting in *intra-*

state commerce by motor vehicle as a regular occupation is not exempt from regulation if he undertakes also even casual or occasional transportation of passengers in interstate commerce. *Interstate Commerce Commission Ruling No.* 49, Apr. 15, 1937, and *Interstate Commerce Commission Ruling No.* 80, May 23, 1939. While the instances in which this view was formally declared by the Commission are not numerous, no instance has been cited to us wherein the Commission has departed therefrom. Although the facts are not precisely like ours, *Webster Common Carrier Application*, 72 M.C.C. 768 (1957) is analogous and is in accord with these rulings.

The Commission found and concluded that the proposed service is not essentially different from the charter service afforded by the opposing motor common carriers; that the applicant has failed to show a real need for the proposed service which cannot be met by the existing carriers, and that he failed to establish that the proposed operation would be consistent with the public interest and the National Transportation Policy. The rejection of the plaintiff's application necessarily followed.

We are not at liberty to try the case *de novo*. It is conceded that the findings of fact are substantially supported by the evidence. Even if we should disagree with the Commission's judgment in resolving the conflicting competitive considerations, we are not authorized to substitute our own views. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, at 535. See also *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, wherein the Supreme Court recently applied the well established rule that such considerations are for the Commission and not for the courts.

Finding no error of law, the plaintiff's petition is denied. An order will be entered accordingly.

SIMON E. SOBELOFF
United States Circuit Judge.
ROBY C. THOMPSON
United States District Judge.
A. D. BARKSDALE
United States District Judge.

APPENDIX B

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

DATE OF SERVICE
JUL 8 1957

INTERSTATE COMMERCE COMMISSION

No. MC-116215

NORRIS EDWARD BASS CONTRACT CARRIER APPLICATION

Decided June 26, 1957.

Operation by applicant as a contract carrier by motor vehicle of passengers and their baggage, in charter service, between points in Virginia, on the one hand, and, on the other, all points in the United States, over irregular routes, found not consistent with the public interest and the national transportation policy. Application denied.

Wilbur G. Burnette for applicant.
Linwood C. Major, Jr., and *William C. Battle* for protestants.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS HUTCHINSON, WALRATH, AND McPHERSON

BY DIVISION 1:

Exceptions to the order recommended by the examiner were filed by applicant, and certain protestants replied.

By application filed September 20, 1956, Norris Edward Bass, doing business as N. E. Bass, of Gladys, Va., seeks a

permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of passengers and their baggage, in charter service, over irregular routes, between points in Virginia, on the one hand, and, on the other, all points in the United States. Five motor common carriers[1] oppose the application.

The examiner recommended that the application be denied. On exceptions, applicant contends (1) that protestants, which hold certificates to operate as common carriers of passengers, cannot furnish the charter service desired by public witnesses supporting the application; (2) that a public need has been shown for the proposed service; and (3) that the examiner erred in finding that applicant's past operations between points in Virginia and points in other States and the District of Columbia have been, and are unauthorized, and should be discontinued. In reply, protestants contend that applicant's position is untenable, and without merit, and that the application should be denied.

The evidence adduced has been considered in light of the exceptions and reply thereto, and we find the examiner's statement of facts to be correct and adequate in all material respects. We adopt such statement as our own, and we will restate the pertinent facts only to the extent necessary for clarity of discussion.

Applicant has been engaged in the transportation of school children to and from schools in Campbell County, Va., for several years. He also transports special groups of persons under charter contracts on educational tours, camping trips, and church-convention trips. Six buses of 36-passenger capacity are operated by applicant, of which two have been used in charter service. Applicant has provided charter service for certain groups as follows: school children and their supervisors and sponsors from points in Campbell County to Washington, D. C.; Boy Scouts from points in Campbell

[1]Atlantic Greyhound Corporation, Eastern Greyhound Lines, Richmond Greyhound Lines, Inc., Carolina Coach Co., Inc., and Virginia Stage Lines, Inc.

and Pittsylvania Counties, Va., and from Newport News, Va., to Philmont Scout Reservation at or near Cimarron, New Mex., in 1954, 1955, and 1956; school children from Lynchburg, Va., to Ridgecrest, N. C., in 1954; a church group from Lynchburg to White Sulphur Springs, W. Va., in 1955; school children from a point in Campbell County to Raleigh, N. C.; and school children from points in Campbell County to Chapel Hill, N. C., in 1956. The described operations were performed with the understanding that they were partially exempt from regulation under the provisions of the Interstate Commerce Act. Application seeks a determination of this question, and if operating authority is required to perform such service, he is willing to confne his future operations in interstate or foreign commerce to the occasional transportation of Boy Scout, church and children's groups. Applicant also has received requests for charter service to Niagara Falls, and New York, N. Y., but has made no trips to these points.

The application is supported by a Boy Scout executive in charge of Boy Scout organizations in 14 counties in south and central Virginia, the superintendent of public schools in Campbell County, and a minister with supervisory jurisdiction over churches of his faith located in Amherst, Pittsylvania, and Roanoke Counties, Va. For the past four years the Boy Scout executive has arranged for use of applicant's service between Lynchburg and Cimarron. Under the arrangements made, applicant's bus is leased to the group for the entire journey so that unscheduled side trips may be taken by the group enroute and upon arrival at Cimarron. Other carriers have been utilized for these trips, but due to extra charges for side trips and the inflexibility of the operation once the contracts have been arranged, their service has not been as satisfactory as that of applicant. Other scouting trips are being contemplated by the scout council represented by the witness, which would require transportation to points in northern Michigan and to Valley Forge, Pa. All public carriers are being contacted by the scout council, including rail carriers, for the Valley Forge trip which may become a biannual national scouting event.

Applicant's service has been satisfactory, and the scout council is willing to enter into such special contracts as the Commission may require, if the proposed service is authorized.

The school superintendent arranges for daily transportation to and from the schools of Campbell County, but does not select the carriers to be utilized for interstate trips planned for groups of school children. Such matters are within the jurisdiction of individual school principals, none of whom appeared in support of the application. The minister has utilized applicant's service for approximately six years, has found it to be satisfactory, and desires to use it in the future in connection with occasional trips of church groups to the District of Columbia and points in Pennsylvania and West Virginia. His satisfaction stems from applicant's congeniality and willingness to accommodate incidental desires and needs of his passengers. This witness never has requested information concerning charter service to points outside of Virginia from any other carrier.

Protestants conduct extensive motor bus operations over regular routes, and provide service to every point of substantial size or importance in Virginia. Under section 208(c) of the act, they may transport to all points in the United States, charter parties which originate at points on their regular routes or which originate at points within the territory served by their regular routes. See *Regulations Special or Chartered Party Service*, 20 M.C.C. 25. They maintain a substantial amount of equipment at various strategic points in Virginia which is available for group transportation. The supporting witnesses have presented no evidence to indicate that the group transportation desired by them cannot be performed by these common carriers under the Commission's rules and regulations as set forth in the Chartered Party Service case, supra. The proposed service is not essentially different from that offered and afforded by the opposing motor common carriers. We are unable, therefore, to agree with applicant's contentions (1) that the proposed service is that of a contract carrier, and (2) that since only common-carrier service is now available, a grant of the application

would be consistent with the public interest and the national transportation policy.

With respect to the contention that the examiner erred in concluding that applicant's past in interstate commerce operations have been unauthorized and should be discontinued, applicant argues that inasmuch as his transportation of school children, for the most part, is within Virginia, he is a "person not engaged in transportation by motor vehicle as a regular occupation or business" within the meaning of section 203 (b) (9) of the act, and, that, therefore, the occasional transportation performed by him in interstate commerce is within the exemption provided by that section. This contention is without merit. It is clear that the applicant is engaged in transportation by motor vehicle as a regular occupation or business, and that the considered operations are within the certificate or permit requirements of part II of the act. In the circumstances, applicant is required to obtain from us appropriate operating authority before he may engage further in for-hire transportation in interstate or foreign commerce.

The burden of proof is upon applicant to show that there is a real need for the proposed service which cannot be met by existing carriers. No such showing has been made, and, in the circumstances, we have no alternative but to deny the application. Other contentions, made by applicant do not warrant specific discussion, but have been considered and found to be not meritorious.

We find that applicant has failed to establish that the proposed operation would be consistent with the public interest and the national transportation policy; and that the application should be denied.

An appropriate order will be entered.

COMMISSIONER WALRATH being necessarily absent did not participate in the disposition of this proceeding.

APPENDIX C

STATUTES INVOLVED

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 202 (49 U.S.C. 302)

(a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

(b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each

State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

Definitions: Sec. 203 (49 U.S. C. 303)

(a) As used in this part—

(5) The term "certificate" means a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle.

(6) The term "permit" means a permit issued under this part to contract carriers by motor vehicle.

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(21) (b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; * * (9) the casual, occasional, or reciprocal

transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part or under a pending application for such a certificate or permit.

Section 204 (49 U.S.C. 304)

It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records qualifications and maximum hours of service of employees, and safety of operation and equipment.

Section 206 (49 U.S.C. 306)

(a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations:

Section 207 (49 U.S.C. 307)

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity;

Section 208 (49 U.S.C. 308)

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

Section 209 (U.S.C. 309)

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act.